

THE COMMONWEALTH OF MASSACHUSETTS  
SUPREME JUDICIAL COURT

SJC- \_\_\_\_\_

COMMONWEALTH OF MASSACHUSETTS,  
APPELLEE

V.

AARON LASTOWSKI,  
DEFENDANT-APPELLANT

**Application for Direct Appellate Review**

Pursuant to Rule 11 of the Massachusetts Rules of Appellate Procedure, Aaron Lastowski, the defendant in the above captioned action, applies for leave to obtain direct appellate review.

A. Statement of the Issues With Respect To Which  
The Defendant Seeks Direct Appellate Review

I. Whether plea counsel who, on May 7, 2014, fails to advise his client that he faces registration as a sex offender as a result of a guilty plea has rendered constitutionally ineffective assistance of counsel.

II. Whether the trial court's denial of the defendant's motion without an evidentiary hearing was an abuse of discretion where the motion adequately raised a serious issue worthy of review.

B. Statement of Prior Proceedings

On May 7, 2014, the defendant, Aaron Lastowski, pleaded guilty in Greenfield District Court Docket No. 1341CR000653 to three counts of indecent assault and battery on a person 14 years or older in violation of G. L. c. 265, § 13H. The defendant was sentenced to one year of probation with conditions. On May 14, 2015, the defendant filed a motion to withdraw his guilty pleas. On October 6, 2015, the plea judge (Mazanec, J.) denied the motion without an evidentiary hearing. On October 9, 2015, the defendant filed a notice of appeal. The case entered the Appeals Court on April 1, 2016.

The case was stayed pending this court's decision in Commonwealth v. Sylvester, 476 Mass. 1 (SJC-11966) (2016). On November 9, 2016, this court decided Sylvester without deciding the ultimate issue: whether trial counsel, under the sex offender registry laws as they exist today, is ineffective for not advising his client of the sex offender registry consequences of a guilty plea. The defendant-appellant respectfully requests that this court now address this issue.

C. Statement of Evidence

According to the Commonwealth, if it took this case to trial, it would be able to prove the following:

On May 7, 2013, Victim 1 reported to the local police that she had been sexually assaulted earlier that day at the Hillcrest Homes Apartment Complex in Turners Falls. A police officer spoke to Victim 1 who reported to him that the defendant approached her and said "I really like to squeeze titties when I'm drinking." The defendant then reached out and grabbed her breast. Victim 1's landlord took a picture of her bruised breast and provided it to the police.

Investigating further, the officer found two other women at the same apartment complex who reported to him that the defendant had sexually assaulted them. Victim 2 reported that the defendant had made a number of sexually suggestive comments to her and said that he likes to get "feely" when he drinks. Victim 2 reported that several months earlier the defendant intentionally rubbed his elbow against her breast and said "Oh you know you like it."

Finally, Victim 3 reported that the defendant had come to her apartment a number of times to socialize and smoke cigarettes. On several occasions, the defendant touched Victim 3's breasts even though she told him she did not want him to do so.

Before accepting his guilty pleas, the court made an inquiry of the defendant. The court made sure that the defendant was aware that he was giving up his trial rights, that there were factual bases for the pleas, and that the pleas were being made absent from coercion, force, promises or inducements. However, the court made no inquiry of the defendant or plea counsel regarding the defendant's obligation to register as a sex offender as a result of the pleas.

The court accepted the defendant's pleas, entered a guilty on each of the three counts, and sentenced the defendant to one year of probation with the conditions that he remain 50 yards from the victims, abstain from alcohol and submit to random testing, submit to mental health and sex offender evaluations and comply with any recommendations, and pay monies to the court.

DEFENDANT'S MOTION TO WITHDRAW GUILTY PLEAS

In his motion to withdraw guilty pleas, filed on May 14, 2015, the defendant claimed that he received constitutionally ineffective assistance because plea counsel failed to advise him that by pleading guilty he would have to register as a sex offender, failed to explain to him the option of tendering a "defendant-capped plea," failed to advise him that he would not have to register as a sex offender if he were given a "continuation without a finding" (CWOFF), and did not attempt to negotiate or proffer a plea for a CWOFF. The defendant further claimed that his pleas were not made willingly, freely, and voluntarily with full knowledge of the consequences because neither the court nor plea counsel advised him that, by pleading guilty, he would have to register as a sex offender.



#### D. Argument

- I. Plea counsel who, in May of 2014, fails to advise his client that he faces registration as a sex offender as a result of a guilty plea has rendered constitutionally ineffective assistance.

In Commonwealth v. Sylvester, 476 Mass. 1 (2016)<sup>1</sup>, the defendant argued that "the United States Supreme Court, in Padilla v. Kentucky, 559 U.S. 356, 364-366 & n.8 (2010), abrogated the distinction between direct and collateral consequences and created a new framework for determining whether a consequence of conviction has a uniquely 'close connection' to the criminal process to require warnings under the right to counsel guaranties of the Sixth Amendment." Sylvester, supra, at 9. This court, in rejecting this argument, stated that "[w]e have interpreted the Padilla case not as an abrogation of the direct and collateral consequence distinction, as

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<sup>1</sup> In July, 2013, William Sylvester filed a motion to withdraw his 2002 guilty plea to indecent assault and battery on the grounds that his plea attorney was constitutionally ineffective and his plea was therefore involuntary because he did not "fully appreciate the consequences of pleading guilty to a sex offense." Sylvester, supra, at 5. Plea counsel in Sylvester only mentioned but did not explain "registration" while the plea judge gave her standard warnings on registration. Sylvester, supra, at 5, 7. The Sylvester case differs in that the defendant in this case claimed that neither the court nor plea counsel provided him with any information about sex offender registration.

the defendant suggests, but simply as clarification that deportation is not "collateral to the criminal justice process". Sylvester, supra, at 10.

Nonetheless, this court found that "[a]lthough not required, the framework used in the Padilla case -- to determine whether deportation was sufficiently close to the criminal process to be within the scope of the Sixth Amendment -- can be applied here." Sylvester, supra, at 11. This court then applied the three Padilla factors<sup>2</sup> and found that although the "consequences of the sex offender registry statutes are 'practically inevitable' ... we conclude that the accompanying penalties, as they existed in 2002, were not so severe as to require defense counsel to advise clients about consequences of registration as a constitutional matter." Sylvester, supra, at 11-12, quoting Padilla, 559 U.S. at 364.

However, this court left "for another day the question whether such advice would be constitutionally

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<sup>2</sup> In Padilla, the Supreme Court announced a three-prong analysis focused on: (1) the "practical inevitability" of the penalty; (2) the "seriousness" of the consequences; and (3) States' statutory recognition of the "critical need" to provide warnings about such consequences. Padilla, 559 U.S. at 363-364, 373-374 & n.15.

ineffective based on the current statutory scheme for sex offender registration." Sylvester, supra, at 2.

A historical review of this state's sex offender registry law and a look at the statute as it existed on the day of the defendant's plea amply support a finding that the penalties associated with sex offender registration were sufficiently severe on May 7, 2014 to require warnings as a constitutional matter.

The Sex Offender Registration and Notification Act (the statute), G. L. c. 6, §§ 178C-F, inserted in 1996 by St. 1996, c. 239, § 1 and replaced in 1999 by G. L. c. 6, §§ 178C-P, inserted by St. 1999, c. 74, §§ 1-2 requires individuals convicted of any enumerated "sex offense" to register their name, home address and work address with the state. G. L. c. 6, §§ 178C-178P. This offender information is then publicly disseminated based on the offender's risk of re-offense as determined by the Sex Offender Registry Board (SORB).<sup>3</sup>

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<sup>3</sup> An offender posing a "low risk of re-offense" had his information disclosed to police departments where he lived or worked, to the Federal Bureau of Investigation, and upon request to adults for their own protection or for the protection of individuals in their care. An offender posing a "moderate risk of re-offense" also had his information disclosed to organizations such as schools, day care centers, religious and youth organizations, and sports leagues in the offender's communities. An offender posing a "high risk of re-



In addition to the collection and off-line dissemination of offender information, the relevant highlights of the version of the statute as it existed on the day of the defendant's plea include:

- (1) A central computerized registry of all sex offenders. G. L. c. 6, § 178D, as inserted by St. 1999, c. 74, § 2.
- (2) A requirement that a sex offender give written notice ten days in advance of establishing a new residence or work address. See G. L. c. 6, § 178E(h)-(j), as inserted by St. 1999, c. 74, § 2.
- (3) A requirement that moderate and high risk sex offenders register by mail and appear personally at their local police station each year. See G. L. c. 6, §§ 178F-F1/2, as inserted by St. 1999, c. 74, § 2.
- (4) With exceptions for those convicted of certain offenses (for whom registration obligations never terminate), sex offenders must register for 20 years after they have convicted or adjudicated or have been released from all custody or supervision (unless relieved from registration by SORB). See G. L. c. 6, § 178G, as inserted by St. 1999, c. 74, § 2.
- (5) A mandatory minimum penalty for failure to register of six months in jail (and up to five years in state prison) for a first offense and no less than five years in state prison for a second or subsequent offense. See G. L. c. 6, § 178H(a)(1)-(2), as inserted by St. 1999, c. 74, § 2.

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offense" also had his information actively disseminated by the police to individual members of the public likely to encounter the offender. See G. L. c. 6, §§ 178I-178K, 178K(2)(b), 178K(2)(c), as inserted by St. 1999, c. 74, § 2.



- (6) Internet dissemination of registration information for moderate and high risk sex offenders and a requirement that sex offenders submit the names and addresses of institutions of higher education. See G. L. c. 6, § 178D, as appearing in St. 2003, c. 140, §§ 5, 11-14; G. L. c. 6, §§ 178C-178G, 178J, 178K as appearing in St. 2003, c. 77, §§ 1-15, 17-20, 22.
- (7) Internet dissemination of registry information by local police departments on their respective websites. See G. L. c. 6, § 178K, as appearing St. 2004, c. 149, § 13.
- (8) Mandatory Community Parole Supervision for Life (CPSL) for a sex offender who had been convicted of certain sex offenses and was later convicted of failure to register and any moderate or high risk sex offender convicted of failure to register regardless of the circumstances. See G. L. c. 6, § 178H(a)(1)-(2), as appearing in St. 2006, c. 139, §§ 26-27; G. L. c. 127, § 133D; G. L. c. 6, § 178H(a)(3), as inserted by St. 2006, c. 303, § 4.<sup>4</sup>
- (9) A requirement that sex offenders divulge "secondary addresses" and high risk offenders became subject to criminal penalties for living in a nursing home. G. L. c. 6, §§ 178C-178K, as appearing in St. 2006, c. 139, §§ 5-25, 28-31; G. L. c. 6, § 178K(2)(e), as appearing in St. 2006, c. 303, § 6.
- (10) A requirement that homeless sex offenders update their registration every 30 days in person at the local police station and wear a global positioning system (GPS) device. G. L. c. 6, §§ 178F-178F1/2, as amended by St. 2010,

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<sup>4</sup> The SJC struck down CPSL as unconstitutional in Commonwealth v. Cole, 468 Mass. 294 (2014). However, Cole was decided on June 11, 2014, one month after the defendant's guilty plea. Therefore, CPSL was something plea counsel could have discussed with the defendant.

c. 256, § 40-41; G. L. c. 6, § 178F3/4, as inserted by St. 2010, c. 256, § 42.

- (11) Moderate and high risk sex offenders cannot have their criminal records sealed. See G. L. c. 276, § 100A(6), amended by St. 2010, c. 256, § 129.
- (12) Criminal penalties for sex offenders engaging in ice cream truck vending. See G. L. c. 265, § 48, as inserted by St. 2010, c. 256, § 119.
- (13) Ineligibility for certain Federal housing programs for households that include a person subject "to a lifetime registration requirement under a State sex offender registration program" became. 42 U.S.C. § 13663 (2012).

Additionally, municipalities made life even more difficult for sex offenders through the enactment of residency restrictions.<sup>5</sup> As of February 20, 2014, the following towns had residency restrictions for sex offenders:

Ashland; Ayer; Barre; Barnstable; Braintree; Charlemont; Charlton; Chelsea; Colrain; Dedham; Dudley; Fall River; Fitchburg; Framingham; Hanover; Hanson; Hopkinton; Hubbardston; Leominster; Lynn<sup>6</sup>;

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<sup>5</sup> "We certainly agree that residential segregation of sex offenders is a very harsh penalty, but the defendant has presented no evidence that these type of restrictions were in effect [in 2002 when] counsel was advising the defendant about the consequences of his plea." Sylvester, supra, at n. 11.

<sup>6</sup> "The [Lynn] ordinance establishes the area within 1,000 feet of a school or park as a residential exclusion zone for [moderate risk] and [high risk] sex offenders, and includes in its description of 'school' all public, private, and church schools, and any other business permitted as a school. The ordinance also applies to all

Marlborough; Mendon; Natick; Norwood; Oxford; Pembroke; Revere; Rockland; Shirley; Somerset; Southborough; Spencer; Springfield; Swansea; Townsend; Waltham; Warren; Webster; West Boylston; and Weymouth. See Doe v. City of Lynn, 472 Mass. 521, n. 7 (2015).<sup>7</sup>

Although this court relied almost exclusively on the second Padilla factor (seriousness of the consequence) in deciding Sylvester, it nonetheless affirmed that the third Padilla factor (a state's statutory recognition of the critical need for warnings) is part of the calculus. Sylvester, supra, at 21-22. See Padilla, 559 U.S. at 373-374. The requirement that defendants be warned of registration consequences appears in three places: First, G. L. c. 6, § 178E(d) requires a judge to notify a defendant pleading guilty

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temporary and permanent residences except a 'residence at a hospital or other healthcare or medical facility for less than fourteen consecutive days or fourteen (14) days in the aggregate during any calendar year.' The geographical and temporal reach of the ordinance effectively prohibits all [moderate risk] and [high risk] sex offenders from establishing residence, or even spending the night in a shelter, in ninety-five per cent of the residential properties in Lynn." Doe v. City of Lynn, 472 Mass. 521, 527 (2015).

<sup>7</sup> This court struck down municipal sex offender residency restrictions in Doe v. City of Lynn, 472 Mass. 521 (2015). However, these restrictions were in place when the defendant tendered his plea and were therefore something plea counsel could have discussed with the defendant.



to an enumerated sex offense "that such plea may result in such sex offender being subject to the provisions of sections 178C to 178P, inclusive" and to require the defendant to acknowledge receipt of such warning in writing. Second, in 2004, (after the plea in Sylvester but before the plea in this case) the Legislature revised<sup>8</sup> Mass.R.Crim.P. 12 to include, if applicable, a notification that a defendant may be required to register as a sex offender. Mass.R.Crim.P. 12(c)(3)(B), as appearing in 442 Mass. 1511 (2004).<sup>9</sup> Third, "the District Court 'tender of plea' form contains a 'waiver of rights' section where a defendant is asked to acknowledge, by signature, that he or she has been warned of the consequences of a guilty plea. Defense counsel must also acknowledge that he or she has explained the consequences of waiving such rights to the defendant....

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<sup>8</sup> "This revision modifies judicial practice and indicates a recognition that the need to provide warnings to defendants became more critical after the Legislature amended the sex offender statutes in 2003 by requiring Internet dissemination of registration information. St. 2003, c. 140, § 5." Sylvester, supra, at 21.

<sup>9</sup> See Roberts, supra, at 364, where the this court held that a defendant may withdraw a guilty plea on the basis of a judge's omission under rule 12 so long as he or she can demonstrate prejudice.



The current form requires a notification about the sex offender registry statute." Sylvester, supra, at 22.<sup>10</sup>

In sum, not only does this state now recognize the need for warnings, sex offender registration now has "consequences . . . that are far greater than was [previously] the case." Sylvester, supra, at 18. The consequences of registration were so severe in May of 2014 that many defendants with a full understanding of their options may have rationally chosen to go to trial and risk incarceration rather than face a lifetime of humiliation and hardship. As such, this court should hold that, as of that date, thorough warnings by counsel of the sex offender registration consequences of a guilty plea were constitutionally required under the right to counsel guaranties of the state and federal constitutions.

II. As the defendant's motion adequately raised a serious issue worthy of review, the trial court's denial of his motion without an evidentiary hearing was an abuse of discretion.

The defendant's affidavits and exhibits adequately alleged that his plea counsel did not give him the appropriate information and advice regarding sex

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<sup>10</sup> In 2002, when the defendant in Sylvester pleaded guilty, the tender of plea and waiver of rights form did not contain a warning about sex offender registration.

offender registration before he tendered his plea or seek a disposition that would have allowed him to avoid registration. The defendant offered his own affidavit as well as affidavits from his fiancée and his appellate counsel. In their affidavits, the defendant, his fiancée and appellate counsel collectively claimed that:

- (1) Plea counsel was inexperienced in the practice of criminal law: he is not a bar advocate and has never taken bar advocate or similar training; he has limited, if any, criminal defense experience; he has never tried a criminal case to a jury; he has never represented a defendant in a criminal case involving a sex offense; he practices primarily in the Probate and Family Court where he takes, among other things, assignments from the Franklin County Women's Grant Program.
- (2) Plea counsel was unwilling to assist the defendant by providing his file (it took three months and sheriff's service to obtain the file) or explaining the advice he gave the defendant (he refused to sign an affidavit, citing his liability insurer).
- (3) Plea counsel encouraged the defendant to plead guilty because he was not prepared for trial.
- (4) Plea counsel was unable to communicate with the defendant in the weeks leading up to trial because plea counsel was taking medication as a result of an accident.
- (5) Plea counsel assured the defendant that all he had to do was remain sober, do a sex offender evaluation, and pay fees to the court.
- (6) The court failed to give the statutorily required registration warnings.

- (7) Plea counsel never advised the defendant that by pleading guilty, he would have to register as a sex offender, that he could seek a CWO, or that a CWO would help him avoid registration.<sup>11</sup>

The defendant's affidavits and exhibits also adequately alleged an "available, substantial ground of defense or ... that there was a reasonable probability that he could have negotiated a different plea bargain." As for a potential trial defense, the defendant alleged in his affidavit that:

He repeatedly told plea counsel that he was innocent and that the three women who came forward, at the same time, accusing him of assault were conspiring together to get him and his fiancée evicted from her government supported housing.<sup>12</sup> He

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<sup>11</sup> Additionally, given the overwhelming strength of the defendant's showing on the issue, the court assumed, without deciding, that plea counsel's performance was constitutionally inadequate. Although the court did not explicitly find that plea counsel's performance fell "measurably below that which might be expected from an ordinary, fallible lawyer," it nonetheless applied the prejudice prong of the Saferian/Strickland analysis to decide the motion. That the court made no mention of the performance prong in its decision yet still applied the prejudice prong is a strong indication that the court found that, at the very least, the defendant adequately raised the issue.

<sup>12</sup> According to the police report, the management of the housing complex confronted the defendant's fiancée about the defendant living in the subsidized apartment that was in her name. The defendant's fiancée did not want him to have to move out and went over management's head. The fiancée also produced paperwork showing that the defendant was her PCA (personal care attendant). Nonetheless, management wanted the defendant out.



presented plea counsel with substantial evidence that would have supported this defense at trial.<sup>13</sup>

The defendant's fiancée claimed that she was present for many of the meetings between the defendant and plea counsel and she is very familiar with the facts of this case because the allegations involve the housing complex where she and the defendant used to live (R. 13A).<sup>14</sup> And appellate counsel affirmed that, in his review of the discovery in this case, he unearthed information that would aid the defendant in presenting a substantial defense if this case were tried to a jury.<sup>15</sup>

Similarly, the defendant adequately alleged that effective counsel may have been able to negotiate a different plea bargain or proffer a tender of plea that did not require the defendant to register. Several considerations weigh in the defendant's favor in this regard:

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<sup>13</sup> From the record, it can be inferred that the defendant was preparing an alibi defense for one or more of the charges.

<sup>14</sup> From the fiancée's affidavit, it can be inferred that she was prepared to be a witness for the defendant as she is and remains supportive of him and is familiar with the fact surrounding the allegations.

<sup>15</sup> Although this statement lacks precision, it would have been foolish for counsel aiding the defendant to fully divulge the defendant's potential defense strategy in writing in advance of an evidentiary hearing.



- (1) According to letters from family and friends, the defendant is a decent, hardworking family man who always puts his children first.
- (2) According to the defendant's board of probation record, he had no prior sexual offense allegations.
- (3) The defendant had never before been convicted of a felony.
- (4) The defendant's most recent involvement with the criminal justice system was 11 years before the plea, in 2003, when he received a CWOFF for assault and battery.
- (5) The defendant's only criminal conviction is from 1999 for defrauding an insurer.
- (6) The defendant's actions may very well have been the product of alcoholism and not an urge to offend sexually thus making substance abuse treatment rather than registration the appropriate way to protect the community.
- (7) The Commonwealth did not argue for or insist on registration as a condition of probation.
- (8) The Commonwealth agreed to probation indicating it did not believe the defendant was so dangerous as to require incarceration to protect the community.

The court ruled that the defendant would likely not have received a CWOFF even though it did not have the benefit of a robust and thorough presentation at sentencing by effective, prepared counsel. See Commonwealth v. Lykus, 406 Mass. 135 (1989) ("[t]he sentencing hearing is not a static proceeding in which the result is predictable. It is a crucial stage in the

system of justice at which the skill and performance of defense counsel can significantly affect the interests of the defendant"); Mempa v. Rhay, 389 U.S. 128 (1967) ("the necessity for the aid of counsel in marshaling the facts, introducing evidence of mitigating circumstances and in general aiding and assisting the defendant to present his case as to sentence is apparent"). Without such a presentation, there is no way to predict whether the defendant could have received a disposition that would have avoided registration.

In its decision, the court ruled that, even if properly advised, the defendant would have pleaded guilty and accepted the sex offender registration consequences of the plea rather than risk going to trial. The court based its decision on its following findings of fact: (1) the case against him was strong; (2) he faced the "very real" possibility of jail time if he lost at trial; (3) he had a prior CWOFF for assault and battery; (4) the defendant "pursued then apparently abandoned" an alibi defense. None of these four findings warrants concluding that the defendant would have been unable to obtain a CWOFF (without or without the consent of the Commonwealth) and would have accepted a guilty plea and registration rather than risk going to trial.

The court erred in finding that the case against the defendant was strong and, as a result, he did not suffer prejudice as a result of plea counsel's poor performance. The court based this finding solely on the police report the Commonwealth read at the plea hearing and the presence of one of the three victims at sentencing.<sup>16</sup> The court did not address the affidavits asserting that the three women who came forward, at the same time, accusing the defendant of assault were conspiring together to get him and his fiancée evicted from her government supported housing, that the fiancée was prepared to testify on the defendant's behalf, that the defendant had presented plea counsel with substantial evidence that would have supported this defense at trial (including a possible alibi defense), and that appellate counsel unearthed information that would aid the defendant in presenting a substantial defense if this case were to a jury.

Similarly, the court erred when it weighed the defendant's 11 year-old CWOFF for assault and battery

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<sup>16</sup> This police report does not contain the defendant's side of the story other than the defendant's statement to the police denying that he touched the three women. The defendant's denial to the police was not part of the Commonwealth's offer of proof.

against him in the calculus and found that he "abandoned an alibi defense." The existence of this old case does not make the defendant an expert on criminal procedure, the process for taking a plea, or the sex offender consequences of a guilty plea. Additionally, contrary to the advice plea counsel gave the defendant<sup>17</sup>, an old CWOFF on a non-sex offense did not automatically bar the defendant from negotiating or tendering a disposition that would have avoided sex offender registration. And the defendant did not "abandon his alibi defense." He tendered a plea with the advice of counsel; by tendering his plea, he abandoned all manner of defense and the full panoply of constitutional rights afforded defendants in criminal cases. That he had an alibi defense does not weaken his position; rather, it strengthens it, as it gives him a possible "substantial grounds of" defense.<sup>18</sup>

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<sup>17</sup> According to the defendant, plea counsel told him that he was barred from asking the court to consider a CWOFF because he had already received such a disposition in another matter.

<sup>18</sup> According to the Defendant's Certificate of Discovery Compliance dated January 6, 2014, the defendant intended to introduce GPS records of his employer, Sumner Heating, at trial to bolster his alibi defense.



Finally, the court erred when it found that the defendant would have accepted a guilty plea rather than risk going to trial even if he had been properly advised about the registration consequences of his plea because there was a "very real" possibility that he could have gone to jail had he lost at trial. First, every defendant accused of a sex offense faces the possibility of jail time. Second, this presumes that, for the defendant, the mere *possibility* of spending a period of time in the local jail was worse than the *certainty* of being a convicted sex offender for life. This finding ignores the reality of sex offender laws at the time of the plea as well as the possibility that "special circumstances" would have caused the defendant to place an emphasis on sex offender registration. Commonwealth v. Clarke, 460 Mass. 30, 48 (2011). In support of his motion, the defendant provided a number of letters of friends and family. These letters paint the defendant as a hardworking, generous, and kind family man whose primary concerns in life are providing for his fiancée and children. As the breadwinner for his family, he was primarily responsible for their financial well-being and as a man with the respect of friends and the community, he would have placed a premium on his reputation. He

would surely have placed primary emphasis on the long-term impacts of being a convicted sex offender on his ability to support his family as well as the humiliation and stigma he would face being a sex offender. Given the totality of the circumstances, it would have been rational under the circumstances for the defendant to reject a plea offer requiring registration.<sup>19</sup>

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<sup>19</sup> It its decision, the court considered it significant that on May 14, 2015, the day he filed the motion to withdraw his guilty pleas, the defendant was in violation of his probation for not completing his sex offender and mental health evaluations. However, the timing of the motion is mere coincidence from which no suspect inference should be drawn. On October 1, 2014, CPCS appointed appellate counsel to represent the defendant at his final hearing in front of SORB. On October 21, 2014, after meeting with the defendant, appellate counsel filed his appearance and requested a CD recording of the plea hearing. From October of 2014 to January of 2015, appellate counsel and the defendant's fiancée repeatedly asked plea counsel to turn over the file. On January 26, 2015, plea counsel finally turned his file over to appellate counsel. Two weeks later, on February 10, 2015, CPCS assigned appellate counsel to assist the defendant in filing a motion to withdraw his guilty pleas. On February 24, 2015, appellate counsel wrote plea counsel seeking information about his representation of the defendant. Plea counsel never provided this information. The transcript of the plea hearing, a necessary attachment to the motion, was not completed until April 13, 2015. One month later, the defendant filed his motion to withdraw guilty pleas with affidavits, exhibits, and the transcript. More significantly, on July 6, 2016, the defendant completed his probation and his probation was terminated. As of today, unless he is allowed to withdraw his plea, the defendant will never face the risk of being incarcerated in this case. Nonetheless, he is pressing forward with this appeal. From this,

E. Conclusion

Based on the authorities cited and the reasons aforesaid, the defendant respectfully requests that his application for direct appellate review be allowed.

RESPECTFULLY SUBMITTED,

AARON LASTOWSKI,  
BY HIS ATTORNEY

*/s/ Edward Gauthier*

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CERTIFICATE OF SERVICE

I, Edward Gauthier, hereby certify that this 5<sup>th</sup> day of January, 2017, I have mailed two copies of the enclosed DAR application via first class mail to:

Office of the District Attorney  
Franklin/Hampshire County  
One Gleason Plaza  
Northampton, MA 01060

*/s/ Edward Gauthier*

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Edward Gauthier, Esq.

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this court may infer that he is and was willing to risk the possibility of incarceration (as the court said in its decision, the Commonwealth has three victims who are cooperative and at least one who appeared at sentencing) to avoid the certainty of registration.



**1341CR000653 Commonwealth vs. Lastowski, Aaron Alexander**

|                    |                                 |                           |   |
|--------------------|---------------------------------|---------------------------|---|
| <b>Case Type</b>   | Criminal                        | <b>Initiating Action:</b> | INDECENT A&B ON PERSON 14 OR OVER c265 §13H |
| <b>Case Status</b> | Disposed - Statistical Purposes | <b>Status Date:</b>       | 05/07/2014                                  |
| <b>File Date</b>   | 05/13/2013                      | <b>Case Judge:</b>        |   |
| <b>DCM Track:</b>  |                                 | <b>Next Event:</b>        |   |

[All Information](#) [Party](#) [Charge](#) [Event](#) [Docket](#) [Disposition](#)**Docket Information**

| <b>Docket Date</b> | <b>Docket Text</b>  | <b>Image Avail.</b> |
|--------------------|---|---------------------|
| 05/13/2013         | Event Scheduled<br>Event: Arraignment<br>Date: 05/13/2013 Time: 02:00 PM  |                     |
| 05/13/2013         | Filed<br>On this date William N. Chambers, Esq. added as Private Counsel for Defendant Aaron Alexander Lastowski  |                     |
| 05/13/2013         | Event Resulted<br>The following event: Arraignment scheduled for 05/13/2013 02:00 PM has been resulted as follows:<br><br>Result: Held                                  |                     |
| 05/14/2013         | Event Scheduled<br>Event: Pretrial Conference (CR)<br>Date: 06/24/2013 Time: 09:00 AM   |                     |
| 06/24/2013         | Event Resulted<br>The following event: Pretrial Conference (CR) scheduled for 06/24/2013 09:00 AM has been resulted as follows:<br>Result: Event Continued<br>Appeared: |                     |
| 06/24/2013         | Event Scheduled<br>Event: Pretrial Conference (CR)<br>Date: 08/13/2013 Time: 09:00 AM<br>Result: Held   |                     |
| 08/13/2013         | Event Resulted<br>The following event: Pretrial Conference (CR) scheduled for 08/13/2013 09:00 AM has been resulted as follows:<br>Result: Held                         |                     |
| 08/13/2013         | Event Scheduled<br>Event: Motion Hearing (CR)<br>Date: 09/03/2013 Time: 09:00 AM<br>Result: Event Continued   |                     |
| 09/05/2013         | Event Resulted<br>The following event: Motion Hearing (CR) scheduled for 09/03/2013 09:00 AM has been resulted as follows:<br>Result: Event Continued<br>Appeared:      |                     |
| 09/05/2013         | Event Scheduled<br>Event: Motion Hearing (CR)<br>Date: 09/17/2013 Time: 09:00 AM<br>Result: Held  |                     |
| 09/17/2013         | Event Resulted<br>The following event: Motion Hearing (CR) scheduled for 09/17/2013 09:00 AM has been resulted as follows:<br>Result: Held<br>Appeared:                 |                     |

| Docket Date | Docket Text   | Image Avail. |
|-------------|---|--------------|
| 09/17/2013  | Event Scheduled<br>Event: Pretrial Conference (CR)<br>Date: 10/22/2013 Time: 09:00 AM<br>Result: Event Continued  |              |
| 10/22/2013  | Event Resulted<br>The following event: Pretrial Conference (CR) scheduled for 10/22/2013 09:00 AM has been resulted as follows:<br>Result: Event Continued<br>Appeared:               |              |
| 10/22/2013  | Event Scheduled<br>Event: Pretrial Conference (CR)<br>Date: 01/06/2014 Time: 09:00 AM<br>Result: Event Continued  |              |
| 01/07/2014  | Event Scheduled<br>Event: Pretrial Conference (CR)<br>Date: 02/11/2014 Time: 09:00 AM<br>Result: Held   |              |
| 01/07/2014  | Event Scheduled<br>Event: First Appearance in Trial Session (CR)<br>Date: 03/12/2014 Time: 09:00 AM<br>Result: Event Continued  |              |
| 01/07/2014  | Event Scheduled<br>Event: Jury Trial (CR)<br>Date: 03/17/2014 Time: 09:00 AM<br>Result: Brought Forward   |              |
| 01/07/2014  | Event Resulted<br>The following event: Pretrial Conference (CR) scheduled for 01/06/2014 09:00 AM has been resulted as follows:<br>Result: Event Continued<br>Appeared:               |              |
| 02/11/2014  | Event Resulted<br>The following event: Pretrial Conference (CR) scheduled for 02/11/2014 09:00 AM has been resulted as follows:<br>Result: Held<br>Appeared:                          |              |
| 03/12/2014  | Event Scheduled<br>Event: First Appearance in Trial Session (CR)<br>Date: 04/09/2014 Time: 09:00 AM<br>Result: Event Continued  |              |
| 03/12/2014  | Event Scheduled<br>Event: Jury Trial (CR)<br>Date: 04/14/2014 Time: 09:00 AM<br>Result: Brought Forward   |              |
| 03/12/2014  | Event Resulted<br>The following event: First Appearance in Trial Session (CR) scheduled for 03/12/2014 09:00 AM has been resulted as follows:<br>Result: Event Continued<br>Appeared: |              |
| 03/12/2014  | Event Resulted<br>The following event: Jury Trial (CR) scheduled for 03/17/2014 09:00 AM has been resulted as follows:<br>Result: Brought Forward<br>Appeared:                        |              |
| 04/09/2014  | Event Scheduled<br>Event: First Appearance in Trial Session (CR)<br>Date: 05/07/2014 Time: 09:00 AM<br>Result: Held   |              |

| Docket Date | Docket Text  | Image Avail. |
|-------------|--|--------------|
| 04/09/2014  | Event Scheduled<br>Event: Jury Trial (CR)<br>Date: 05/12/2014 Time: 09:00 AM<br>Result: Brought Forward  |              |
| 04/09/2014  | Event Resulted<br>The following event: First Appearance in Trial Session (CR) scheduled for 04/09/2014 09:00 AM has been resulted as follows:<br>Result: Event Continued<br>Appeared:  |              |
| 04/09/2014  | Event Resulted<br>The following event: Jury Trial (CR) scheduled for 04/14/2014 09:00 AM has been resulted as follows:<br>Result: Brought Forward<br>Appeared:   |              |
| 05/08/2014  | Charges Disposed:<br>Charge #1 INDECENT A&B ON PERSON 14 OR OVER c265 §13H<br>Date: 05/07/2014<br>Method: Admission to Sufficient Facts<br>Code: Guilty<br>Judge: Mazanec, III, Hon. William F<br><br>Charge #2 INDECENT A&B ON PERSON 14 OR OVER c265 §13H<br>Date: 05/07/2014<br>Method: Admission to Sufficient Facts<br>Code: Guilty<br>Judge: Mazanec, III, Hon. William F<br><br>Charge #3 INDECENT A&B ON PERSON 14 OR OVER c265 §13H<br>Date: 05/07/2014<br>Method: Admission to Sufficient Facts<br>Code: Guilty<br>Judge: Mazanec, III, Hon. William F |              |
| 05/08/2014  | Event Scheduled<br>Event: Status Review of Payments<br>Date: 06/18/2014 Time: 09:00 AM<br>Result: Event Continued  |              |
| 05/08/2014  | Event Resulted<br>The following event: First Appearance in Trial Session (CR) scheduled for 05/07/2014 09:00 AM has been resulted as follows:<br>Result: Held<br>Appeared:   |              |
| 05/08/2014  | Event Resulted<br>The following event: Jury Trial (CR) scheduled for 05/12/2014 09:00 AM has been resulted as follows:<br>Result: Brought Forward<br>Appeared:   |              |
| 06/18/2014  | Event Resulted<br>The following event: Status Review of Payments scheduled for 06/18/2014 09:00 AM has been resulted as follows:<br>Result: Event Continued<br>Appeared:   |              |
| 06/18/2014  | Event Scheduled<br>Event: Status Review of Payments<br>Date: 12/17/2014 Time: 09:00 AM<br>Result: Held   |              |
| 07/14/2014  | Event Scheduled<br>Event: Probation Violation Hearing<br>Date: 07/29/2014 Time: 09:00 AM<br>Result: Held - Probation Violation Found   |              |



| Docket Date | Docket Text   | Image Avail. |
|-------------|---|--------------|
| 07/29/2014  | Event Resulted<br>The following event: Probation Violation Hearing scheduled for 07/29/2014 09:00 AM has been resulted as follows:<br>Result: Held - Probation Violation Found<br>Appeared: |              |
| 07/29/2014  | Event Scheduled<br>Event: Status Review of Payments<br>Date: 09/29/2014 Time: 09:00 AM<br>Result: Event Continued   |              |
| 09/29/2014  | Event Resulted<br>The following event: Status Review of Payments scheduled for 09/29/2014 09:00 AM has been resulted as follows:<br>Result: Event Continued<br>Appeared:                    |              |
| 09/29/2014  | Event Scheduled<br>Event: Status Review of Payments<br>Date: 10/27/2014 Time: 09:00 AM<br>Result: Held  |              |
| 10/21/2014  | Filed<br>On this date Edward C. Gauthier, IV, Esq. added as Private Counsel for Defendant Aaron Alexander Lastowski   |              |
| 10/27/2014  | Event Resulted<br>The following event: Status Review of Payments scheduled for 10/27/2014 09:00 AM has been resulted as follows:<br>Result: Held<br>Appeared:                               |              |
| 10/27/2014  | Event Scheduled<br>Event: Status Review (CR)<br>Date: 11/26/2014 Time: 09:00 AM<br>Result: Held   |              |
| 11/26/2014  | Event Resulted<br>The following event: Status Review (CR) scheduled for 11/26/2014 09:00 AM has been resulted as follows:<br>Result: Held<br>Appeared:                                      |              |
| 11/28/2014  | Event Scheduled<br>Event: Status Review (CR)<br>Date: 01/05/2015 Time: 09:00 AM<br>Result: Held   |              |
| 12/17/2014  | Event Resulted<br>The following event: Status Review of Payments scheduled for 12/17/2014 09:00 AM has been resulted as follows:<br>Result: Held<br>Appeared:                               |              |
| 01/05/2015  | Event Resulted<br>The following event: Status Review (CR) scheduled for 01/05/2015 09:00 AM has been resulted as follows:<br>Result: Held<br>Appeared:                                      |              |
| 04/10/2015  | Event Scheduled<br>Event: Probation Violation First Appearance<br>Date: 04/24/2015 Time: 09:00 AM<br>Result: Held   |              |
| 04/24/2015  | Event Resulted<br>The following event: Probation Violation First Appearance scheduled for 04/24/2015 09:00 AM has been resulted as follows:<br>Result: Held<br>Appeared:                    |              |

| Docket Date | Docket Text  | Image Avail. |
|-------------|--|--------------|
| 04/24/2015  | Event Scheduled<br>Event: Probation Violation Hearing<br>Date: 05/26/2015 Time: 09:00 AM<br>Result: Event Continued  |              |
| 04/24/2015  | Event Resulted<br>The following event: Probation Until scheduled for 05/06/2015 09:00 AM has been resulted as follows:<br>Result: Brought Forward<br>Appeared:             |              |
| 05/26/2015  | Event Resulted<br>The following event: Probation Violation Hearing scheduled for 05/26/2015 09:00 AM has been resulted as follows:<br>Result: Event Continued<br>Appeared: |              |
| 05/28/2015  | Event Scheduled<br>Event: Probation Violation Hearing<br>Date: 06/03/2015 Time: 09:00 AM<br>Result: Event Continued  |              |
| 06/03/2015  | Event Resulted<br>The following event: Probation Violation Hearing scheduled for 06/03/2015 09:00 AM has been resulted as follows:<br>Result: Event Continued<br>Appeared: |              |
| 06/03/2015  | Event Scheduled<br>Event: Probation Violation Hearing<br>Date: 06/30/2015 Time: 09:00 AM<br>Result: Event Continued  |              |
| 06/03/2015  | Appearance filed<br>On this date Susan M Tombs, Esq. added as Appointed - Able to Contribute for Defendant Aaron Alexander Lastowski                                       |              |
| 06/30/2015  | Event Resulted<br>The following event: Probation Violation Hearing scheduled for 06/30/2015 09:00 AM has been resulted as follows:<br>Result: Event Continued<br>Appeared: |              |
| 06/30/2015  | Event Scheduled<br>Event: Probation Violation Hearing<br>Date: 07/29/2015 Time: 09:00 AM<br>Result: Event Continued  |              |
| 07/29/2015  | Event Resulted<br>The following event: Probation Violation Hearing scheduled for 07/29/2015 09:00 AM has been resulted as follows:<br>Result: Event Continued<br>Appeared: |              |
| 07/30/2015  | Event Scheduled<br>Event: Motion Hearing (CR)<br>Date: 08/31/2015 Time: 09:00 AM<br>Result: Held   |              |
| 07/30/2015  | Event Scheduled<br>Event: Probation Violation Hearing<br>Date: 08/31/2015 Time: 09:00 AM<br>Result: Event Continued  |              |
| 08/31/2015  | Event Resulted<br>The following event: Motion Hearing (CR) scheduled for 08/31/2015 09:00 AM has been resulted as follows:<br>Result: Held<br>Appeared:                    |              |

| Docket Date | Docket Text  | Image Avail. |
|-------------|--|--------------|
| 08/31/2015  | Event Resulted<br>The following event: Probation Violation Hearing scheduled for 08/31/2015 09:00 AM has been resulted as follows:<br>Result: Event Continued<br>Appeared: |              |
| 08/31/2015  | Event Scheduled<br>Event: Probation Violation Hearing<br>Date: 10/06/2015 Time: 09:00 AM<br>Result: Not Held But Event Resolved  |              |
| 10/06/2015  | Event Resulted<br>The following event: Probation Violation Hearing scheduled for 10/06/2015 09:00 AM has been resulted as follows:<br>Result: Not Held But Event Resolved  |              |
| 01/06/2016  | Event Resulted<br>The following event: Probation Until scheduled for 01/06/2016 09:00 AM has been resulted as follows:<br>Result: Event Continued                          |              |
| 04/08/2016  | Event Resulted<br>The following event: Motion Hearing (CR) scheduled for 04/08/2016 09:00 AM has been resulted as follows:<br>Result: Held                                 |              |
| 04/11/2016  | Event Scheduled<br>Event: Motion Hearing (CR)<br>Date: 04/08/2016 Time: 09:00 AM<br>Result: Held   |              |
| 07/06/2016  | Event Resulted<br>The following event: Probation Until scheduled for 07/06/2016 09:00 AM has been resulted as follows:<br>Result: Held - Probation Terminated              |              |



## COMMONWEALTH OF MASSACHUSETTS

Franklin, ss

District Court Department  
Of the Trial Court  
Greenfield Division  
Docket No. 13 41 CR 0653

Commonwealth of Massachusetts

V.

Aaron Lastowski

## Court's Decision Regarding Defendant's Motion to Withdraw Guilty Plea

## Analysis and Decision

The defendant contends in his Motion to Withdraw Guilty Plea that his attorney handling this matter at the time of his plea was ineffective for a for several reasons and because he claims to not having been informed of the collateral consequence of registering as a sex offender by his attorney. The defendant further contends that the court also did not inform him of the collateral consequence of sex offender registration.

### FACTS:

The defendant was arraigned on May 13, 2013 on a complaint charging him with three counts of indecent assault and battery upon a person over the age of fourteen years. Attorney William Chambers entered an appearance as the defendant's attorney on July 11, 2014. On August 27, 2013 Attorney Chambers filed numerous discovery motions with the court including a Motion for a Bill of Particulars, Motion for Production of Third Party Records. On September 17, 2013 these motions were heard and essentially allowed by the court. On October 21, 2013 the Commonwealth filed its Bill of Particulars in response to the defendant's motion. Attorney Chambers filed an Affidavit in Support of the Defendant's Motion for the Production of Third Party Records in which he suggested that the third party records in the hands of the defendant's employer would contain the global positioning system coordinates necessary to establish the defendant's whereabouts at the time of the alleged criminal activity and thereby support an alibi defense. Chamber's affidavit in support of the request for a Bill of Particulars contained a similar statement regarding the necessity to have the particulars to establish an alibi defense. This case was held for pre-trial conferences on October 22, 2013 and then again on January 6, 2014. On January 6<sup>th</sup> the case was scheduled for pretrial conference on February 11, 2014 as well as a trial status conference on March 12, 2014 and a jury trial date of March 17, 2014. On April 9, 2014 Attorney Chambers filed a Motion to Continue the trial to May. This Motion was allowed. The case was next scheduled for trial status conference on May 7, 2014 and jury trial on May 12, 2014. On May 7, 2014 at the trial status conference the defendant tendered an un-agreed plea with the Commonwealth requesting a two year probationary term and the defense requesting a one year probationary term. The court conducted a plea colloquy and determined



that the defendant understood he was waiving his right to a jury trial, his right to confront and cross-examine his accusers, his right to offer a defense and his right to be presumed innocent and compel the Commonwealth to prove his guilt beyond a reasonable doubt. The court inquired if the defendant was thinking clearly and entering a plea voluntarily and absent coercion and the defendant indicated he was thinking clearly and pleading guilty voluntarily. The court also inquired of the defendant if he'd had enough time to speak to Attorney Chambers, if Attorney Chambers had explained the elements for the charges and the maximum sentence for the charges and if the defendant was satisfied that Attorney Chambers was acting in his best interest in this case. The defendant answered in the affirmative to both of these questions. The court did not warn the defendant of the possible consequence of registration as a sex offender. The court heard the facts of this case and learned that there were three separate female witnesses who were prepared to testify that the defendant had sexually assaulted each of them. All three females reported the defendant had made unwanted sexual overtures towards them which were declined and all three reported that the defendant subsequently forcefully grabbed either their breasts or their crotch area. In two of the reported incidents alcohol use by the defendant was reported by the victims. The defendant heard these facts recited in court and agreed to them being the true facts. The court considered the victim impact statement of one victim and reviewed the defendant's record before hearing the arguments of the Commonwealth as well as Attorney Chambers on behalf of the defendant. The court then accepted the defendant's tender of plea as well as his requested disposition terms. The defendant was found guilty on all three counts and placed on probation for one year with a sex-offender evaluation and follow-up counseling as recommended together with a mental health evaluations and completion of treatment as directed. The defendant was ordered to remain alcohol free and to submit to testing and finally the defendant was ordered to remain 50 yards away from and to have no contact with all three female victims. The defendant signed his conditions of probation on May 7, 2014. On July 11, 2014, less than two months into the probation, the defendant was served with a probation violation notice dated July 8, 2014 for violating his probation terms by testing positive for alcohol on June 26, 2014. Attorney Chambers appeared on behalf of the defendant at the violation of probation. On July 29, 2014, assisted by Attorney Chambers, the defendant admitted to this first violation and he was reprobated with only an additional one-time probation supervision fee of \$200 as a consequence of the violation. According to documents filed by Attorney Edward Gauthier, the defendant's current counsel, Attorney Gauthier was appointed on October 1, 2014 to represent the defendant at the Sex Offender Registry Board. Attorney Gauthier then filed an appearance in this matter on October 21, 2014. On January 5, 2015 the defendant successfully convinced the court to waive his numerous fees due to the defendant's medical condition and the case was continued by the court to the outside probation date of May 6, 2015 for review so full compliance of probation and the defendant's lack of ability to pay could be considered at the same time. On April 8, 2015 a second violation of probation notice was filed with the court with notice mailed to the defendant alerting him to appear on April 24, 2015. The alleged violations this time were the defendant's failure to attend Sex Offender Evaluation and Treatment as well as failure to attend Mental Health Evaluation and Treatment, both ordered nearly one year earlier at the very beginning of probation. On April 24, 2015 the defendant appeared, waived counsel and the matter was scheduled for a final violation of probation hearing on May 26, 2015. On May 14, 2015 the defendant, through Attorney Gauthier filed a Motion to Withdraw the Defendant's Guilty Plea.



## ANALYSIS:

This court has reviewed the affidavits of Attorney Gauthier, the defendant and the defendant's wife as well as the pleadings and the entire docket. This court does not find credible the defendant's assertion that he plead guilty in error because he did not know he could request a continuation without a finding. Furthermore this court likewise does not credit the defendant's contention that he would not have plead guilty had he known he might have to register as a sex offender.

The defendant faced up to two and a half years on each of the three counts in this complaint. Sentenced consecutively he faced over six years in the House of Correction. The defendant did not come before the court with a clean criminal record and had a prior admission to an assault and battery. Moreover, the defendant had pursued and then apparently abandoned an alibi defense based upon his own employer's GPS work records. The case against the defendant was strong with three separate victims in this case who were apparently cooperative with the prosecutor and motivated enough with respect to at least one victim to follow this case and appear in court nearly a year after the case began to express the depth of her victimization by the defendant in her impact statement. Hence, the defendant faced the very real possibility of incarceration if convicted at trial. The plea in this case was a defendant-capped plea which allowed the defendant to withdraw if his terms were exceeded by the court and then he could proceed to trial. The exchange that his trial counsel engaged in with the court regarding the Commonwealth's late-breaking change in recommendation makes clear that the defendant knew he could obtain a Commonwealth recommendation of probation and avoid incarceration if he plead guilty prior to trial. Under these circumstances at that time this court finds that even if the defendant had been informed of the possibility of sex offender registration it would not have materially affected his decision to plead guilty and thereby eliminate the possibility of incarceration. Therefore this court finds that the defendant's assertion that he would not have plead guilty if he had known about the possibility of having to register as a sex offender lacks credibility.

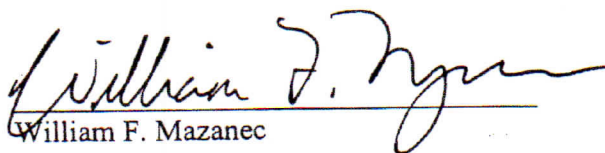
The defendant's contention that he would not have plead guilty if he had known he could request a "continuation without a finding" and thereby avoided the possibility of sex offender registration is likewise not credible. The defendant's record reveals he already had four different dockets continued without a finding including one for assault and battery. Additionally, he already had one conviction on his record. Under these circumstances and based upon the facts the defendant admitted to at the plea hearing a continuation without a finding disposition was extremely unlikely. The question then becomes if the defendant tendered such a plea and the court exceeded his plea terms by entering a guilty finding would the defendant have then withdrawn his plea and taken this case to trial or would he have accepted the guilty findings with a straight probation term in order to avoid the possibility of incarceration? Once again under these circumstances at that time this court finds that even if the defendant had been informed of the possibility of requesting a continuation without a finding it would not have materially affected his decision to admit to the facts in this case and thereby eliminate the possibility of incarceration. Hence this court finds that the defendant's assertion that he would not have plead



guilty if he had known about the possibility of requesting a continuation without a finding lacks credibility.

The timing of the defendant's request to withdraw his plea further supports this court's finding. The defendant was found to be in violation of his probation for consuming alcohol within two months of being placed on probation. The defendant was represented by counsel at that time. By October 1, 2014 and from that point on the defendant had a second attorney appointed by the Committee for Public Counsel Services. Two months later in December 2014 the defendant was before the court requesting waiver of his various court fees owing to some type of medical condition and the court ordered the fees waived subject to a review of his overall compliance with the other conditions of probation at the end of his probation in May of 2015. By April of 2015, eleven months after being placed on probation the defendant is noticed for a violation for not having completed either an evaluation or treatment for either a his mental health condition or as a sex offender. This history reveals the defendant faced a second violation of probation hearing which would reveal he had, once again, failed to comply with the conditions of his probation. Moreover, the waiver of fees in December was specifically linked to an assessment in May of the defendant's overall compliance with the other conditions of probation so the defendant also faced the possibility of the waived fees being reinstated. At a violation of probation hearing where there has already been one violation found and the defendant has not even completed one of the two evaluations order much less any recommended treatment it is unlikely the defendant expected a favorable result. It was under these circumstances that the defendant's request to withdraw his guilty plea was filed on May 14, 2015 an entire year after he was placed on probation and just twelve days before he faced a second violation of probation hearing.

For the foregoing reasons the defendant's Motion to Withdraw his Guilty Plea is hereby Denied.

A handwritten signature in dark ink, appearing to read "William F. Mazanec", is written over a horizontal line.

William F. Mazanec  
First Justice  
Greenfield District Court

October 6, 2015